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NO. 85-7189

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1985 TERM

WILLIAM WILEY,

Petitioner

VERSUS

STATE OF MISSISSIPPI

Respondent

---

ON PETITION FOR WRIT OF CERTIORARI TO THE  
MISSISSIPPI SUPREME COURT

---

**RESPONDENT'S BRIEF IN OPPOSITION**

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QUESTIONS PRESENTED

1. WHETHER THIS COURT SHOULD GRANT REVIEW OF A  
LAWFUL CONVICTION OF CAPITAL MURDER AND  
SENTENCE OF DEATH IN THE ABSENCE OF A MERCY  
INSTRUCTION DURING SENTENCING WHERE THE JURY  
WAS FULLY INSTRUCTED TO CONSIDER ANY FACTORS  
THEY FOUND MITIGATING.
2. WHETHER THIS COURT SHOULD GRANT REVIEW  
OF AGGRAVATING FACTORS WHICH HAVE BEEN  
CONSISTENTLY FOUND CONSTITUTIONAL BY  
STATE AND FEDERAL COURTS.

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## BRIEF IN OPPOSITION =====

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of Mississippi be denied in this case.

## II. OPINION BELOW

The opinion of the Supreme Court of the Mississippi is reported as Wiley v. State, 483 So.2d 339 (Miss. 1986). A copy of the opinion is before the Court as an Exhibit to petitioner's Petition for Writ of Certiorari to the Supreme Court of Mississippi.

### III. JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C §1257(3).

### IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendments VIII and XIV.

### V. STATEMENT OF THE CASE

Petitioner appears before this Court as a result of the Mississippi Supreme Court's direct affirmance of conviction and death sentence on March 19, 1986. Petitioner had been earlier found guilty of capital murder and sentenced to death in a bifurcated trial; however, the Mississippi Supreme Court overturned the sentencing phase of that trial in Wiley v. State, 449 So.2d 756 (Miss. 1984). At the subsequent resentencing, the jury once again returned a sentence of death. On direct appeal to the Mississippi Supreme Court, petitioner alleged twelve errors:

1. That the Court erred in refusing to grant a change of venue;
2. That the trial court erred by improperly excusing juror no. 41, Leroy Payne, under Witherspoon examination;
3. That the court erred in sustaining the district attorney's objection to defense counsel's opening argument regarding the jury's sentencing options;
4. That the Court erred by admitting into evidence over defendant's objection State's exhibits S-6, S-8, S-9, S-10, S-23, and S-24;
5. That the Court erred by allowing, over defendant's objection, witness Holt to testify concerning the illegality of defendant's shotgun;

6. That the Court erred by allowing, over the defendant's timely objection, witness Marie Turner to testify as to the character of her late husband, the victim;
7. That the Court erred by refusing to grant defendant's jury instructions D-1, D-2 and D-3 and
8. That the Court erred in granting state's jury instruction C-3A, which includes aggravating circumstances which repeat one another;
9. That the verdict of the jury was and is against the overwhelming weight of the evidence and contrary to law;
10. That the sentence of death was imposed under the influence of passion, prejudice, and/or some other arbitrary factor;
11. That the evidence does not support the jury's finding if one or more aggravating circumstances set forth in instructions of law given to the jury;
12. That the sentence of death was and is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

The Mississippi Supreme Court rejected each of these. Wiley v. State, 484 So.2d 339 (Miss. 1986), action which forms the basis of this appeal.

### STATEMENT OF THE FACTS

The facts of this case are graphically and sufficiently set forth in the opinion of this Court. Wiley v. State, 484 So.2d at 339-363, a copy of which is appended to the petition.

### REASONS FOR DENYING THE WRIT

Petitioner has presented no substantial federal question nor is there a conflict of law necessitating determination by this court, therefore the petition for writ of certiorari should be denied.



## ARGUMENT

### **1. THE TRIAL COURT'S REFUSAL TO GRANT A MERCY INSTRUCTION DID NOT VIOLATE PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.**

The only circuits to have yet ruled on this issue support the conclusion of the Mississippi Supreme Court that the Eighth and Fourteenth Amendments of the United States Constitution do not require the granting of a mercy instruction to the jury in cases where the death sentence may be imposed. The Fifth Circuit has expressly upheld the practice in Mississippi of informing the jury that it may impose death only if the aggravating circumstances outweigh the mitigating circumstances in Gray v. Lucas, 677 F.2d 1086 (5th cir. 1982), cert den., 461 U.S. 910 (1983). The Eleventh Circuit's holding in Kemp v. Wilson, 777 F.2d 621 (11th Cir. 1985) cert den., 54 LW 3777 (May 27, 1986) is not in conflict with the Fifth Circuit, as petitioner suggests. In Kemp, the Court held only that the prosecutor's arguments to the effect that mercy is never a proper consideration for the jury were so prejudicial as to constitute reversible error. To argue that mercy is an improper consideration in deciding whether or not to impose death, the Court stated, "is significantly different from a prosecutor's legitimate plea in any particular case that the jury not extend mercy. The latter argument...leaves the jury free to decide for itself whether to grant mercy." 777 F.2d at 626.

Similarly, California Supreme Court cases, cited heavily by petitioner, have never mandated the use of a mercy instruction, although the court has often been called upon to overrule the use of a non-sympathy instruction. According to People v. Zamphear, 36 Cal. 3d 163, 680 P.2d 1081, 203 Cal Rptr 122 (1984), it is the defendant's background and character, presented to the jury through the use of mitigating circumstances that are the proper tool for eliciting sympathy if it is warranted by the defendant's

background and character. To instruct the jury to not consider sympathy would defeat the very purpose of the mitigating circumstances; however, at no time has the California Supreme Court required that a mercy instruction be given.

In Mississippi, the defendant may put on evidence to show the existence of seven statutory mitigating factors, Miss. Code Ann. 99-19-101 (Supp. 1985) but he is not limited to these seven. Washington v. Watkins, (1981 CAJ Miss) 655 F.2d 1346. If sympathy is warranted, given the defendant's individual circumstances, it can be elicited in Mississippi through the proper use of the mitigating circumstances, including the so-called "catchall" factor which allows consideration of any other fact deemed mitigating. In the present case, Appellant has not even suggested that he was in any manner hampered in presenting the jury with a full range of arguably mitigating facts and circumstances or in arguing their relative weight of the jury. To the contrary, the record reflects a defense closing argument which urged, in addition to the two relevant statutory mitigating factors, "any other matter ... which you, the Jury, deem to be mitigating .... (R. Vol. V, 841-2) Further, as there is no United States Court of Appeals and no state court of last resort which mandates the granting of a mercy instruction in the absence of a statutory requirement, there is no conflict for this Court to resolve.

### **2. THE AGGRAVATING CIRCUMSTANCES USED IN THIS CASE DO NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.**

Of initial note, the only court to rule that an aggravating circumstance may not repeat the underlying felony (in this case, robbery) is the North Carolina Supreme Court. Should the Fourth Circuit, when it has the opportunity, overrule State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979) cert. den., 446 U.S. 941 (1980), it will be in accord with both the Fifth and the Eleventh Circuits, the only federal circuit courts to have ruled on this issue heretofore.

There is also no conflict among the Circuit Courts as to the "doubling" of two aggravating factors (robbery and pecuniary gain). While petitioner cites the Eighth Circuit as having held differently from both the Fifth and Eleventh Circuits in Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985) cert. den., \_\_U.S.\_\_, 106 S.Ct. 546 (both of which permit the use of pecuniary gain as an aggravating circumstance when robbery is also used as an aggravating circumstance), the Eighth Circuit expressly held that their decision invalidating this practice as used in Arkansas "does not place us in conflict with the opinions of the Fifth and Eleventh Circuits...because those cases all arose in states, Georgia, Florida, Louisiana, which have adopted a quite different approach to appellate review of capital sentences." 754 F.2d at 267-268.

Petitioner cites Florida as a state which "has reached an opposite result from Mississippi on the issue." But the case upon which petitioner relies, Provence v. State, 337 So.2d 783 (Fla. 1976) cert. den., 431 U.S. 969 (1977) was singular in that the trial judge had imposed a sentence of death after the jury recommended life; this he did without specifying the aggravating circumstances upon which he relied. The Delaware Supreme Court, in Flamer v. State, 490 A.2d 104 (Del. 1983), has pointed out that the

Florida Supreme Court, in several post-Provence decisions, has affirmed the death penalty where, as here, the two allegedly duplicate statutory aggravating circumstances were found in addition to other aggravating factors and where mitigating factors were presented for the jury's consideration. See Jacobs v. State, Fla. Supr., 396 So.2d 1113, 1119 (1981); Fleming v. State, Fla. Supr. 374 So.2d 954, 957-58 (1979); Hargrave v. State, Fla Supr., 366 So.2d 1,5 (1978) cert. den., 444 U.S. 919.

The North Carolina Supreme Court, in rejecting the argument that pecuniary gain should be restricted to instances of contract murder stated:

Submission of the aggravating factor of pecuniary gain does not relitigate the question of intentional killing of any

element of the offense first-degree murder under the felony murder rule. Our decision in State v. Oliver, 302 N.C. 28, 274 S.E.2d 1983 (1981) is on point. In Oliver, defendants were convicted of felony murder, with the underlying felony being armed robbery. This Court held that the circumstance of pecuniary gain was not an essential element of felony murder. "This circumstance examines the motive of the defendant rather than his acts. While his motive does not constitute an element of the offense, it is appropriate for it to be considered on the question of his sentence. Id. at 62, 274, S.E.2d 183.

State v. Irwin, 282 S.E.2d, 439, 448 (N.C. 1981).

Other states have adopted this reasoning: Wyoming, Engberg v. State, 686 P.2d 541 (Wyo. 1984); Arkansas, Miller v. State, 605 S.W.2d 430 (Ark. 1980); Delaware, Flamer, supra; Missouri, State v. McDonald, 661 S.W.2d 497 (Mo. banc. 1983); Arizona, State v. Gretzler, 659 P.2d (Ariz. 1983); and Florida through Provence v. State, supra. Since Mississippi's use of pecuniary gain as an aggravating circumstance not limited to contract killings is not a minority position, and as there is no conflict among the Circuit Courts of Appeal, there is no error for this Court to correct.

**3. PETITIONER IS BARRED FROM ASSERTING THAT THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS OR CRUEL IS UNCONSTITUTIONALLY VAGUE AS APPLIED BY THE STATE.**

Petitioner is barred from claiming that the aggravating circumstances of "especially heinous, atrocious, or cruel" is unconstitutionally vague as applied by the state of Mississippi as he has not raised this issue previously on appeal. Before the Mississippi Supreme Court, petitioner alleged only that the evidence in his case was insufficient to support a finding of heinous, atrocious or cruel but he failed to argue that the standard was unconstitutionally vague, Wiley v. State, 484 So.2d 339, 352; thus, this Court should rightfully deny relief based upon this new assertion of the petitioner.

This issue has been addressed on the merits by the Fifth Circuit in Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982) in which it found that Mississippi had "consistently applied this factor to pitiless crimes which are unnecessarily tortuous to these victims." 677 F.2d at 1110-11. The Court also indicated that a narrowing construction of these terms would continue through the use of the Court's proportionality review. Id. In Billiot v. State, 454 So.2d 445, 464 (Miss. 1984), the Mississippi Supreme Court stated that the heinous standard would apply only to those cases "accompanied by such additional facts as to set the crime apart from the norm of capital felonies." See also Johnson v. Thigpen, 623 F.Supp. 1121, 1137 (D.C. Miss. 1985), Coleman v. State, 378 So.2d 640, 648.

#### CONCLUSION

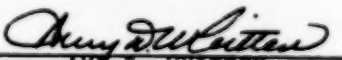
Clearly, Petitioner has shown no reason for this Court to award a writ of certiorari. Accordingly, Respondent prays for denial of the petition.

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I, Amy D. Whitten, a Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Respondent's Brief In Opposition to the following:

Kenneth J. Rose  
Attorney at Law  
Post Office Box 22986  
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This, the 12<sup>th</sup> day of August, 1986.

  
AMY D. WHITTEN